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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1959

No. 523

AB ELECTROLUX,

Petitioner,

vs.

NATIONAL GAS APPLIANCE CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is now reported at 270 F. 2d 472.

QUESTION PRESENTED.

Assuming *arguendo* the existence of a question, a fair statement of it would not embrace a rebellion by the Court of Appeals against a recent Illinois Supreme Court decision, as petitioner in effect asserts. It simply would be whether or not the Court of Appeals in its application of the Illinois statute on judicial jurisdiction to the particular facts of this case decided the matter in conflict with a recent decision of the Illinois Supreme Court.

STATEMENT.

Petitioner's epitomic version of the facts leaves considerable to be said with regard to the background of the case, matters important to judicial jurisdiction.

In the summer of 1957 a group of Chicago, Illinois, business men, who incorporated in Delaware and own respondent company, located at Chicago, foresaw a potential market in the United States for gas refrigerators to be sold at prices competitive with their electric counterparts. (R. 3, 28) The market was promising for the only manufacturer of gas refrigerators was discontinuing its line and gas utilities companies were sorely in need of a gas refrigerator to complete the merchandising of their "gas kitchens." (R. 3)

Petitioner manufactured a unique device for cooling refrigerators which functioned on gas, had no moving parts and consequently was silent and enduring in its operation. (R. 3, 24) Respondent's plan was to import petitioner's cooling units and install them in refrigerator cabinets to be fabricated for respondent in this country. (R. 3, 28) Petitioner, at the time, was coveting an American market. (R. 24)

Respondent from Chicago, by cable and telephone, opened negotiations with petitioner in Stockholm in August, 1957, for the purchase of its cooling device. (R. 28) Petitioner wasted no time manifesting its interest in the plan by letter to respondent in which the latter was referred to petitioner's United States representative, one Edmund A. Fenander, in New York City. (R. 29, 30) From August, 1957, until the disruption of the relations between the parties on February 10, 1958, they worked together in complete harmony and design, for their ultimate mutual

profit, to fabricate a refrigerator cabinet housing petitioner's cooling unit which would meet the exacting requirements of the gas utilities companies in America. (R. 25-27, 28-40) Petitioner extended to respondent all the technological help it could muster. (R. 25)

During the mentioned seven months' period the parties engaged in the following activities:

(a) They communicated with each other, between Stockholm and Chicago, by mail, transatlantic telephone, cable and wireless countless times with reference to contract terms and technical problems. (R. 25, 38-39)

(b) They exchanged between Stockholm and Chicago engineering drawings, specifications, ideas, information and instructions on all aspects of the refrigeration problems involved. (R. 25)

(c) Petitioner sent from Stockholm to Chicago for respondent's use still pictures, motion pictures, recordings for training salesmen, scripts, radio commercials and printed publicity material extolling its products. (R. 25)

(d) Respondent's representatives went to Stockholm in September, 1957, spending 12 days there conferring with petitioner's management on contract terms and technical matters. (R. 25-26)

(e) Petitioner at various times shipped to respondent at Chicago sample cooling units, gas control devices, gas burners and prototypes of refrigerators which were tested and demonstrated by respondent in Chicago and elsewhere in aid of the fabrication of a suitable refrigerator cabinet. (R. 26)

(f) Respondent shipped from Chicago to Stockholm for testing in petitioner's laboratories several American-made refrigerators and insulation material. (R. 26)

(g) Respondent demonstrated the petitioner's cooling unit at a meeting of the American Gas Association in Chicago, Illinois, in September, 1957. (R. 27)

(h) Petitioner's chief engineer Ullstrand came to Chicago from Stockholm in October, 1957, spending about 4 days with respondent's representatives *discussing terms of the proposed contract between the parties,* technical problems involved and participating in tests in Chicago and Aurora, Illinois, of sample cabinets patterned after petitioner's Swedish cabinet. (R. 26, 33)

(i) On January 7, 1958, respondent wrote petitioner requesting that their contract discussions be reduced to writing. (R. 9)

(j) On January 17, 1958, petitioner from Stockholm solicited respondent by telegram to submit a firm order for cooling units covering respondent's April to June requirements. (R. 42)

(k) Respondent, by telegram to Stockholm on January 20, 1958, ordered 3,200 cooling units from petitioner. (R. 27, 42)

(l) By respondent's letter of January 21, 1958, over the signature of its president, Mr. E. V. Ekman, the terms of the agreement between the parties were reduced to writing, and respondent was requested to advise petitioner of its acceptance thereof. (R. 9-12)

(m) On January 28, 1958, petitioner's chief engineer, Ullstrand, and its Edmund A. Fenander came to Chicago for discussions with respondent's representatives. That evening, Mr. Fenander spent 2 to 3 hours with respondent's president, Sheriff, inquiring into respondent's finances. Mr. Fenander requested that a meeting be arranged for him with respondent's banking connections. (R. 34, 35)

(n) Mr. Ullstrand spent about 5 days in Chicago with respondent's representatives working on technical matters. They flew to Manitowoc, Wisconsin, to inspect the cabinet which defendant, Manitowoc,

was fabricating for respondent. Mr. Ullstrand had brought from Sweden a gas burner and control device, which were tested at the Peoples Gas, Light & Coke Company's laboratory at Chicago, Illinois, in the presence of respondent's representatives and Mr. Ullstrand. From respondent's office, Mr. Ullstrand telephoned Dr. Robert S. Taylor (formerly chief engineer of Servel, Inc.) at Evansville, Indiana, to discuss adjustments of the gas burner for proper mixtures of gas and air for the different types of gases used in the United States. He persuaded Dr. Taylor to agree to render consulting services to respondent. (R. 34-37)

(o) On January 29, 1958, while Messrs. Ullstrand and Fenander were in Chicago, respondent telegraphed petitioner at Stockholm that the terms of the agreement set forth in Mr. Ekman's letter of January 21, 1958, were satisfactory. (R. 12)

(p) Respondent paid Harris Trust and Savings Bank at Chicago, on account of the purchase price of cooling units ordered from petitioner a total of $5,595, which money the bank cabled to petitioner's bank in Stockholm between January 31 and February 6, 1958. (R. 27, 37)

(q) Between January 31 and February 10, 1958, the parties were in contact by telephone and telegrams between Chicago and Stockholm with reference to petitioner's claim that it had not received the money above described and its request that respondent post a bank guarantee by February 10, 1958, of $186,900 to secure future payments. (R. 37)

(r) On February 10, 1958, at 6:23 A.M., petitioner wired from Stockholm to respondent at Chicago that because of "further damaging information your (respondent's) financial background and dealing forces us to withdraw offer forthwith we consequently unable deal with you." (R. 15)

(s) Petitioner wrote respondent on March 11, 1958, to advise that it would not consider resumption of

> relations with respondent because it had reached a preliminary agreement with (defendant) Manitowoc for the production of a refrigerator using petitioner's cooling unit and that there no longer was room for respondent in the field. (R. 23-24)

Thereafter respondent sued petitioner and the defendant, Manitowoc, in the Circuit Court of Cook County, Illinois. Manitowoc removed the case to the United States District Court at Chicago. Petitioner was served by summons delivered personally to its agent Fenander in New York. Respondent's claim against petitioner, involved in this application for certiorari, is for the breach of petitioner's contract with respondent to sell the latter its gas cooling units. The contract was made in Illinois by respondent's dispatch from Chicago of its telegram of January 29, 1958, to petitioner accepting the offer made by the latter in its letter of January 21, 1958. (subparagraphs (f) and (o) above) The making of a contract between the parties was conceded for the purposes of the appeal by petitioner's counsel on the oral argument of this case below. This concession is twice mentioned in the opinion below. (270 F. 2d at pages 474-5) Respondent contends the court had judicial jurisdiction over petitioner by reason of the more than "minimal contacts" which it had with the State of Illinois in its dealings with respondent out of which the cause of action arose. With this both the District Court and the Court of Appeals agree.

REASONS FOR DENYING CERTIORARI

I.

The Court of Appeals Decision is Distinctly Correct.

In construing Section 17 of the Illinois Civil Practice Act, both state and federal courts agree that this statute expands judicial jurisdiction to the maximum limits of due process. In both *Nelson* v. *Miller*, 11 Ill. 2d 378, 389

(1957) and *Grobark v. Addo Machine Company, Inc.*, 16 Ill. 2d 426, 431 (1959), the Court said:

> "Sections 16 and 17 of the Civil Practice Act reflect a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause."

Similar statements are found in *Orton v. Woods Oil and Gas Co.*, 7 Cir., 249 F. 2d 198, 202 (1957); *Bluff Creek Oil Company v. Green*, 5 Cir., 257 F. 2d 83, 86 (1958); *Kane-Martin v. Brooks*, 7 Cir., 267 F. 2d 394, 397 (1959); *Haas v. Faucher Furniture Company*, N.D. Ill., 156 F. Supp. 564, 567 (1957); *Rensing v. Turney Aviation Corp.*, N.D. Ill., 166 F. Supp. 790, 798 (1958); *Sunday v. Donovan*, 16 Ill. App. 2d 116, 126, 147 N.E. 2d 401, 463 (1958); and *Berkowitz v. Superior Distributing Co.*, 17 Ill. App. 2d 522, 524-525, 151 N.E. 2d 116, 117-118 (1958). No court has rejected this significant statement of the policy underlying Section 17.[1]

Additionally, in *Nelson v. Miller, supra*, 11 Ill. 2d 378, at page 384, the Supreme Court of Illinois made it clear that Section 17 was enacted to take advantage of the new and expanded boundaries of state jurisdiction announced in this Court's decision in *International Shoe Co. v. Washington*, 326 U.S. 310.

In the light of the foregoing, the Illinois Court in *Grobark*, considering for the first time Section 17(1)(a) of the Illinois Act, being the "transaction of *any* business" clause, and the Court of Appeals in the present case,

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[1] This is the interpretation of all commentators who have discussed Illinois Section 17. For examples, Cleary & Sedar, **Extended Jurisdictional Basis for the Illinois Courts**, 50 NW. U.L. Rev. 599, 607 (1955); O'Connor & Goff, **Expanded Concepts of State Jurisdiction over Non-Residents**, 31 Notre Dame Lawyer, 223, 237 (1956); Reese, **Judicial Jurisdiction Over Non-Residents; The Impact of McGee v. International Life Insurance Company**, 13 The Record of The Association of The Bar of The City of New York, 139, 151 (1958).

with the same problem, were primarily engaged in an interpretation of the due process requirements of the Fourteenth Amendment as defined by this Court. This for the reason that the permissible areas of due process and those of Illinois Section 17 are co-extensive. Essentially, in application of the Illinois law to the facts of a particular case, the courts of Illinois need not, as petitioner suggests, first consider whether jurisdiction attaches under the state law and then approach the due process problem. The two questions may be wrapped up in one operation. Petitioner's concern, then (Petition, pages 6-7) with the rationale of the Court of Appeals as primarily one involving the due process problem raised by the Federal Constitution overlooks this similarity between federal and state law. It is not merely that the Federal Constitution delimits the Illinois law but it, through the decisions of this Court, defines it as well.

Significantly, the opinion of the Illinois Supreme Court in *Grobark* revolves about the Federal Constitutional problem. The same complaint which petitioner levels at the Court of Appeals in the present case could be advanced against the opinion in *Grobark*. Chief Justice Daily, speaking for the majority of the Court in *Grobark* (Justices Davis and Schaefer dissenting) after devoting virtually his entire opinion to a discussion of the recent decisions of this Court on judicial jurisdiction, said in conclusion (16 Ill. 2d at page 438, 158 N.E. 2d at page 79):

> "As recently announced by the United States Supreme Court, in the *Hanson* case, there are still territorial limitations to a State's *in personam* jurisdiction. Since Addo did not have 'minimum contacts' with the State of Illinois, we are of the opinion that Addo did not submit to the jurisdiction of the Illinois courts."

That the Court of Appeals in its decision in the instant case considered the Illinois law, including the *Grobark* case, with the decisions of this Court, is evident by the following quotation from the Court's opinion (page 475):

> "These acts of defendant's representatives, which occurred in Illinois, constitute at least such minimal contacts with that state that the maintenance of this suit there does not offend traditional notions of fair play and substantial justice. *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316; *McGee* v. *International Life Ins. Co.*, 355 U.S. 220. Cf. *Hanson* v. *Denckla*, 357 U.S. 235, 251; *Orton* v. *Woods Oil and Gas Co.*, 249 F 2d 198; *Kaye-Martin* v. *Brooks*, 267 F. 2d 394; *Grobark* v. *Addo Machine Co.*, 16 Ill. 2d 426.
>
> "We are not at this time concerned with the merits of this case. We merely hold that the district court, *under Illinois law*, has jurisdiction of the cause of action asserted against the defendant AB Electrolux in this case." (Emphasis supplied)

The Court in its citation signal prefacing *Denckla, Orton, Kaye-Martin* and *Grobark, supra,* indicated the authority of these cases for the proposition cited but made it clear that in its opinion their facts are materially different from those at bar.

Additionally, on the oral argument of the instant case considerable time was utilized by the Judges of the Court with counsel in a discussion of the ramifications of *Grobark.*

But the case at bar turns on its own facts. In applying the limits of due process courts must necessarily determine each case on an *ad hoc* basis.

Petitioner contends that the "decision below relied primarily on two visits to Illinois" by representatives of

the petitioner. This is a masterful statement in de-emphasis of the facts.

Actually, the record discloses that petitioner conducted an economic invasion of Illinois lasting for a period of some seven months. It was not just a "footpad" or sortie in Illinois. Petitioner's motive was to realize a pecuniary benefit or profit and hence was purposeful. True, the petitioner did not reap a harvest, but that was its own fault, not respondent's. From August, 1957 until petitioner repudiated its contract with respondent on February 10, 1958, the parties were virtually wedded in a union dedicated to the development for marketing throughout the United States of a gas refrigerator which would function with petitioner's cooling unit. This was the hypostasis of the relationship. Obviously, petitioner in order to sell its cooling device had to make it work in the refrigerator cabinet being designed and fabricated in America for respondent.

Accordingly, petitioner's officers and agents extended themselves in their cooperation with respondent in the diagnosis and solution of the many perplexing technical problems which cropped up to plague the parties. Petitioner's "know how" derived from years of experience in the refrigeration field was marshaled to help respondent.

The agents of petitioner came to Illinois on two occasions in pursuit of their employer's business with respondent. One of them, Mr. Hugo Ullstrand, petitioner's chief engineer, spent four days on the occasion of his first visit and five days on the next, working with respondent's officers. These visits were not just casual "drop ins". Chief Engineer Ullstrand brought into the forum the respondent's products (the subjects of the ultimate contract) which were subjected to exhaustive tests in which he participated. Conversely, refrigerator

cabinets and allied materials of American manufacture were sent from the forum to petitioner in Stockholm where they, in turn, were tested and in the presence of respondent's agents who spent twelve days in Stockholm conferring with petitioner's management on contract terms and technical matters.

All media of communication between Stockholm and Chicago were utilized by the parties in the exchange of technological information, in contract discussions and finally with respect to performance of their contract.

Significant also is the fact that petitioner sent from Stockholm to Chicago for respondent's use still pictures, motion pictures, recordings for training salesmen, scripts and the like, extolling the virtues of the refrigerators and cooling units which it manufactured and sold in European markets and elsewhere.

The invaluable assistance petitioner extended respondent during the months they worked hand in hand, including the sending of its agents, products and publicity into Illinois, was an indirect, possibly, but cogent solicitation and negotiation of respondent's business.[2]

On this the Court below said (270 F.2d at page 475):

> "While defendant argues in this court that its chief engineer Ullstrand did not come to Chicago to negotiate any contract, but to discuss technical engineering problems, the evidence is uncontradicted that both he and defendant's United States representative,

[2] Petitioner asserts (p. 11) that the complaint does not allege that any actual contract negotiations took place in Illinois. However, the affidavit of respondent's president, in opposition to petitioner's motion, states that discussions of contract terms did occur in Chicago, Illinois, in conversations between affiant and chief engineer Ullstrand during the latter's October, 1957, visit. (R. 33) This was never denied by Mr. Ullstrand.

> Fenander, in Illinois, at plaintiff's plant and elsewhere, were busily engaged in satisfying plaintiff that it would be advantageous for it to use defendant's cooling units. Their efforts were obviously directed toward the consummation of the contract in question."

Petitioner directly solicited respondent in Chicago by telegram of January 17, 1958, to submit a firm order for cooling units covering respondent's April to June requirements. (R. 42)

The offer on the part of petitioner to sell its products to respondent was contained in its letter of January 21, 1958, over the signature of its president, E. V. Eckman, mailed from Stockholm to respondent at Chicago, Illinois. (R. 9-12) After reciting at length the terms of the offer, including all the essential elements of their bargain, Mr. Eckman in closing stated:

> "I believe this is more or less all that is required. If you agree I shall have the agreement drawn up in proper legal form."

Pursuant thereto respondent telegraphed its unequivocal acceptance of this offer on January 29, 1958. (R. 12)

The fact that the terms of the offer were to be "drawn up in proper legal form" did not destroy the efficacy of the contract expressed in petitioner's letter and accepted by respondent's wire. *Geary* v. *Great Atlantic and Pacific Tea Company,* 366 Ill. 625, 628-9, 10 N.E. 2d 350, 351 (1937); *Sanders* v. *Pottlitzer Bros. Fruit Co.,* 144 N.Y. 209, 213-4, 39 N.E. 75, 76 (1894); 1 Williston on Contracts (rev. ed.) sec. 28 (A) 64, 67. Particularly is this rule applied where the parties have acted on the contract as in the instant case. *New York Hamilton Corp.* v. *First Illinois Co.,* 257 Ill. App. 125, 130 (1930). In *Johnston* v. *Commission,* 352 Ill. 74, 76, 185 N.E. 191, 192 (1933) the

Supreme Court of Illinois announced the elementary principle of the law of contracts that the place where the last act necessary to give validity to the contract is done is the place where the contract is made. The conclusion is inescapable that the contract between the parties became effective on January 29, 1958, when respondent wired its acceptance from Chicago of petitioner's earlier offer. This was when the last act necessary to give validity to the contract occurred. The minds of the parties had met and agreed upon certain specified and distinct obligations which were to be observed by both. It is plain that Chicago was the place where the contract was made.

Petitioner in this Court denies the existence of a contract between the parties (Petition, p. 3 *et seq.*). This denial must be with *tongue in cheek* since its counsel, in his oral argument before the Court below, conceded the existence of a contract for the purposes of the appeal. This concession is twice alluded to in the opinion below, 270 F. 2d at pages 474 and 475.

It is readily apparent from the letters of petitioner's officers that they considered a contract duly made. President Ekman in the crucial letter of January 21, 1958, described it as a "*draft agreement*", stated "I believe the *agreement* can be condensed as follows", and then in legal phraseology proceeded to recite the terms of the contract by saying (R. 9):

> "*Agreement* between AB Electrolux, Stockholm, hereinafter called Elux, and National Gas Appliance Corporation, Chicago, hereinafter called National.
>
> 1. Elux *agrees* to supply National with cooling units, etc. . ."

In clause No. 11 of this same letter Mr. Ekman stated: "*This agreement* may be terminated with 12 months notice" and then additionally provided for immediate

termination of the "*agreement*" on the occasion of certain specified events. (emphasis supplied) (R. 11)

Mr. N. Laurin, petitioner's vice president, wrote respondent on January 22, 1958, a letter the whole tenor of which was to the effect that an agreement had been reached by the parties, saying, among other things: "According to the terms of payment agreed upon. . . .". (R. 13-14)

Consistent with petitioner's conviction that it had a contract with respondent are its telegraphic requests to respondent in February, 1958, to make the payments required by the agreement. (R. 37)

Petitioner's arguments in denial of a contract seem futile in the light of the above mentioned concessions and facts. Assuming then a contract and one made in Illinois, it is apparent that this alone is sufficient for jurisdiction of Illinois courts. If the making of a contract of this nature is not the transaction of "*any business*"; it is impossible to conceive of what precisely would constitute the transaction of some business.

Petitioner argues that even if the contract was made in Illinois when respondent "accepted" petitioner's letter, it would not be significant since under Illinois law the place of performance rather than the place of making is considered the controlling factor in choice of law. (Note 5, pages 10-11) While the place of performance may govern the construction of a contract, this is not the issue here. The place of making is a significant factor as a judicial jurisdiction "contact".

In *Hanson* v. *Denckla*, 357 U.S. 235, at pages 251-252, this Court, in distinguishing *Hanson* from *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, considered of special importance, among other things, the fact that in

McGee the offer by mail of the non-resident defendant was *accepted* in California.

Of course, whether or not the contract in the case at bar was made in Illinois is not decisive of the matter by any means. The least that can be said for the contract is that it had a substantial connection with Illinois.

Additional to petitioner's affiliations with Illinois already considered are the final phases of the relationship of the parties, the requests of petitioner for payments under the contract (R. 37), the remittances by respondent from Chicago, totaling $5,595 to petitioner's Stockholm bank (R. 27, 37)[1], and petitioner's break-off cable to respondent of February 10, 1958, in which it said that because of damaging information it received with regard to respondent's financial background, it was unable to "deal" with respondent. (R. 15) Respondent relies on this cablegram as a breach of contract.

In *Compania de Astral, S.A.* v. *Boston Metals Co.*, 205 Md. 237, 107 A.2d 357 (1954), certiorari denied 348 U.S. 943, a case comparative to the instant case but lacking in many of the connections shown here, the Maryland Court of Appeals sustained the constitutionality of a statute subjecting foreign corporations to suit on causes of action arising out of a contract made in Maryland.[2] The Court held that the contacts with the forum of a Panama corporation having no office in the United States *(or registered agent)* and not "doing business" in Maryland were

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[1] Analogous to the premium payments in **McGee.**

[2] Md. Ann. Code, art. 23, 88(d) (1951). This statute is not broader than Illinois Section 17 as petitioner asserts in Note 3, page 6 of its petition. The statute requires that a contract be made in Maryland or a liability incurred there. See discussion of this statute in O'Connor & Goff, **Expanded Concepts of State Jurisdiction Over Non-Residents**, 31 Notre Dame Lawyer 223, 238 (1956).

sufficient for jurisdiction under the statute and satisfied the Federal Due Process Clause.

In the *Astral* case, the only connections the defendant had with the forum were (1) its agents went to Baltimore on two occasions to inspect the three frigates which it was purchasing, the subjects of the contract, (2) the defendant's agents had a one-day conference with plaintiff in Baltimore and reached a general agreement as to price (but the final contract terms were worked out in New York), (3) the contract documents after being executed in Panama were brought by defendant's agents to Maryland where they were signed by plaintiff, (4) defendant sent a notification to plaintiff advising of the acceptability of the vessels, and (5) defendant made an escrow deposit in Baltimore pursuant to the contract which provided, among other things, that its construction was to be in accordance with Maryland law.

As to these connections the Maryland Court of Appeals said (205 Md. at page 261-2, 107 A.2d at page 267):

> "All of these things . . . it is true, related to what was but a single transaction; but all told, they add to a considerable contact with this State and considerable reliance upon its laws and the protection which they afforded."

But *Compania de Astral* as well as *Grobark* are lacking in the many additional contacts conspicuous in the case at bar, particularly those contained in petitioner's solicitation of respondent's business extending over a period of some seven months. This relation as manifested both in and out of the forum was not an arm's length transaction as suggested by petitioner below, but a virtual partnership. It was not expressed unilaterally in the forum but bilaterally. It was stimulated by petitioner's desire to penetrate into a potentially substantial and rich American market.

The petitioner enjoyed the benefits and protection of the laws of Illinois. It is certain that if respondent had defaulted in its obligations under the contract petitioner would have utilized the courts of the forum. With the exception of the officers of the petitioner, all witnesses, both willing and unwilling, are in Illinois and Wisconsin. The unwilling ones, of course, could not be required to go to Sweden for a trial there. The expense to respondent of a trial overseas would be prohibitive, to say nothing of the hardship involved. In effect, to relegate respondent to a suit in Sweden is to give petitioner relative immunity from legal responsibility.

Justice Davis made the point, relevant here, in his dissent in *Grobark* (16 Ill. 2d at page 439) that to refuse plaintiffs in that case to sue Addo in Illinois would require them to go to New York where they would be unable in their suit to join the individual resident defendants. So, here, respondent would be unable to join defendant Manitowoc in any litigation in Sweden. It would seem that fair play and substantial justice would be served by a trial of this suit in Illinois.

The cause of action sought to be enforced arises out of petitioner's activities in this state, in connection with its relationship with respondent. It is clear that the contacts of petitioner with the State of Illinois, solicitation and negotiation, plus contract plus performance are sufficient even to constitute a "doing of business" in the forum.[1]

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[1] The late Justice Rutledge expressed himself vigorously on the matter of "solicitation" in **Frene v. Louisville Cement Co.**, D.C. Cir., 134 F.2d 511, 516, when he said: ". . . No business man would regard 'selling', the 'taking of orders,' 'solicitation' as not 'doing business.' The merchant or manufacturer considers these things the heart of business . . . It would seem, therefore, that the 'mere solicitation' rule should be abandoned when the soliciting activity is a regular, continuous and sustained course of business, as it is in this

Petitioner's constant references to the requirement in the forum of a "registered agent" to sustain jurisdiction over a foreign corporation demonstrates, it seems, a forlorn hope that this Court will return to the rigid concepts of *Pennoyer* v. *Neff*, 95 U.S. 714.

II.

There is no Conflict of Decision.

The *Grobark* case, *supra*, 16 Ill. 2d 426, 158 N.E. 2d 73 (1959), around which petitioner's application here gravitates is readily distinguishable on its facts from those of the case at bar. Again, it is noted that *Grobark* is the first Illinois Supreme Court case to construe the "transaction of any business" clause of section 17. Also is noted that the District Court had the benefit of the Appellate Court's decision in *Grobark*, 18 Ill. App. 2d 10, 151 N.E. 2d 425 (1958), when it passed on petitioner's motion attacking the jurisdiction of the court.

Grobark is not close factually to the case at bar. The defendant there, a New York manufacturer, sold its goods to independent Illinois businessmen for resale. The orders for its goods were placed in New York where they were accepted. The defendant in *Grobark* did not employ any officers or agents in Illinois and had no control over plaintiff or any of its distributors in Illinois or elsewhere.*

Without implying similarity in other respects between *Grobark* and the case at bar, the essential differences between them are:

(1) Defendant in *Grobark* employed no officers or agents in Illinois. Petitioner, on the other hand, had

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* (Continued)
case. It constitutes, in the practical sense, both 'doing business' and 'transacting business,' and should do so in the legal sense. . ."

its agents in Illinois on two occasions for an aggregate of about nine days. They were actively pursuing in the forum its business with respondents. While in *Grobark* the plaintiffs charged in their complaint that defendant's president had negotiated with them in Chicago, to make them distributors of defendant's products, this is not mentioned in the Appellate Court's opinion, nor is it borne out by the record findings of the Supreme Court which said that defendant employed no officers or agents in Illinois. (16 Ill. 2d at 437)

(2). Defendant in *Grobark* does not appear to have had the countless contacts with the forum had by petitioner through the agencies of mail, telephone, wireless and cable.

(3) *Grobark's* defendant no longer had any possessory interest in the products it sold after their delivery to independent carriers in New York, whereas at bar petitioner loaned its products (and advertising materials) to respondent in Illinois for testing, experimentation and exposition.

(4) *Grobark's* defendant had no control over its vendee distributors in Illinois or elsewhere. Petitioner at bar, however, exercised certain controls over respondent, first, as to where it could sell its products (R. 11), and, second, the important right of approval of the refrigerator cabinets to be manufactured to house its cooling units for respondent in this country. (R. 9)

(5) In *Grobark* the plaintiffs could order defendant's products or not, as they saw fit, and orders were accepted in New York. At bar there was no privilege of acceptance or rejection of orders, petitioner was obligated to furnish the contract requirements and respondent to accept and pay for them. (R. 10)

(6) In the instant case the relationship between the parties, enduring some seven months, was virtually a partnership in the development of a refrigerator which would function on petitioner's unit. In fact petitioner was obligated by contract to give all possible assistance to respondent in the development of refrigerator models. (R. 9) In *Grobark* the relationship was the antithesis of this, plaintiff's activities there being strictly unilateral.

(7) At bar there was a vigorous solicitation of respondent's business by petitioner during the entire period of the relationship, this in the form of extensive technical help and assistance given in the forum and by transmittal to it through the various media of communication. Additionally, petitioner directly solicited respondent's order for cooling units by telegram to respondent at Chicago. Solicitation was absent in *Grobark*.

(8) At bar the parties negotiated their contract by mail as well as by discussions in Stockholm and Chicago.

(9) Here there is a contract between the parties made in Illinois. In *Grobark* there was no such contract and petitioner's constant insistence throughout its petition that there was will not create the fact. The *alleged* contract in *Grobark* was a letter written by defendant to plaintiffs. The Illinois Appellate Court said this letter required nothing of plaintiff in the way of performance and held the letter "which plaintiffs say is a contract" unilateral and void for want of mutuality. 18 Ill. App. 2d at page 15, 151 N.E. 2d at page 427. The Supreme Court did not consider, apparently, that there was much to plaintiffs' contention and declined to pass on the validity of the alleged contract. 16 Ill. 2d at page 438, 158 N.E. 2d

at page 80. This position of the Supreme Court did not amount to approval or disapproval of the Appellate Court's holding that the alleged contract was void and leaves the Appellate Court's pronouncement on this point as the law of the case. 5B C.J.S., Appeal & Error, § 1964, p. 574, and cases cited. A fortiori, there was no contract in *Grobark*.

The claims which petitioner attributes to *Grobark* throughout its brief are completely unfounded, particularly so is its contention that *Grobark* is identically similar to the case at bar and that *Grobark* holds that neither the making and negotiation of a contract within the state constitutes the "transaction of any business" justifying judicial jurisdiction. If *Grobark* has done this to section 17, it has completely emasculated the act and no court could be criticized for failure to follow *Grobark*.

The holding in *Grobark* simply is that the defendant did not have the "minimal contacts" with Illinois required for due process. It is a very general holding and in no way predetermines this case. There is no doubt but that if the present case were before the Supreme Court of Illinois it would decide it as did the Court of Appeals.

III.

There Are No Special And Important Reasons For Granting the Writ.

The principal theme in petitioner's application to this Court is predicated on the alleged error of the Court of Appeals in interpreting state law. Petitioner thus concedes the applicability of Illinois law, but on pages 13 to 15 of its petition, it raises the question as to whether state or federal law governs the jurisdiction of federal courts over foreign corporations in diversity cases, concluding that the decisions of the lower federal courts are

in conflict on this question. This conflict, however, is not irreconcilable.[6]

Petitioner did not raise this point below and can not now contend seriously that some federal precedents (not mentioned by it) control the instant case rather than the law of the forum as measured by due process. Certainly there is no federal rule on the subject which would supersede. Without offering something of greater efficacy it is obvious that petitioner, in desperation, is raising an issue which, as to this case, is purely academic.

Rule 19(1) of this Court states emphatically that a review is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor. Special and important reasons imply a reach to a problem beyond the academic or the episodic. *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74.

Certiorari, if granted here, would be for the sole interest of petitioner and would be an imposition, we believe, on this Court's time for consideration of those classes of

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[6] See discussion in Note, 67 Yale L.J. 1094, 1104 et seq. (1958). Petitioner states that this Court's reversal of the Seventh Circuit in **Riverbank Laboratories v. Hardwood Products Corp.**, 350 U.S. 1003, has raised doubts resolvable by granting certiorari in the present case. Professor Kurland in "Mr. Justice Frankfurter, The Supreme Court And The Erie Doctrine In Diversity Cases", 67 Yale L.J. 187, 211-212, Note 120 (1957) points out that the Seventh Circuit decision relied on Illinois decisions rendered prior to **International Shoe** and cases which thereafter broadened the powers of the states in this area. He speculates that this Court's **per curiam** decision might have been the means of expressing a view that recognizes state law to be something other than what the last reported judicial decision states it to be.

cases the adjudication of which is this Court's chief function.

The specter of a great rush of business to the federal courts in Illinois on account of the decision in this case, raised by petitioner to alarm the Court, will never materialize. The record of decisions below since January 1, 1956, the effective date of present Section 17, is a dismal one from the standpoint of prospective plaintiffs hopeful of success on a judicial jurisdiction issue. The Seventh Circuit's decisions to date stand four against jurisdiction and one in favor of it.[1] The latter is this case.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[1] Cases decided against jurisdiction are **Orton v. Woods Oil & Gas Co.**, 7 Cir., 249 F.2d 198 (1957); **Kaye-Martin v. Brooks**, 7 Cir., 267 F.2d 394 (1959), certiorari denied, 361 U.S. 832; **Trippe Manufacturing Co. v. Spencer Gifts, Inc.**, 7 Cir., 270 F.2d 821 (1959), and **Insull v. New York World-Telegram Corporation**, 7 Cir., No. 12,681 (December 30, 1959). In the **Insull** case, the Court referred to the case at bar as an example of what amounts to "the transaction of any business within this state."